IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 439

UNITED STATES OF AMERICA,
Appellant,

v.

BOWMAN DAIRY COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR BOWMAN DAIRY COMPANY.

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QUESTION PRESENTED.

Where the Government selects nine stores for the purpose of testing the validity of a seller's discount system, and the seller proves that the differences in the prices charged to those stores were cost justified, does the seller's cost defense fail because of the suggested possibility that some other unidentified store may have paid a discriminatory price which the seller might not be able to justify?

STATEMENT.

Although embraced within the same record, the Government's cases against The Borden Company and Bowman Dairy Company, respectively, involve different facts and different issues. Pursuant to the order of this Court entered on January 15, 1962, this separate brief deals only with the appeal as to Bowman Dairy Company.

The Nature of Bowman's Business.

The Bowman Dairy Company operates in the "Chicago area", as defined in the complaint (R. 4), as well as in various outlying areas. The record does not indicate Bowman's relative position in the market,[1] but does show a material decline in its chain store business. Thus, in March, 1955, Bowman was serving 49 Kroger stores and 43 A&P stores in the Chicago area (R. 335-36)[2]. In January, 1956, the number of Kroger stores had declined to 47 and A&P to 41 (R. 369). Later that year, Kroger closed the store which the Government had used as a sample in its *prima facie* case (R. 554, 62). The following year, Bowman lost the business of the Goldblatt stores (R. 540), and, effective November 1, 1958, it lost the entire A&P account (R. 540).

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1. The assertion on page 6 of the Government brief that Bowman accounts for 38% of the sales is based solely on an allegation in the complaint (R. 6) which Bowman denied (R. 23). This allegation referred to the year 1950.

2. The Government's reference to 163 chain stores (Br. 6) includes stores located in outlying areas as well as those located in the Chicago area, and also includes 79 stores which Bowman no longer serves (R. 335-36, 369, 540, 554).

Bowman's Discount Structure.

Effective January 19, 1953, Bowman introduced a new type of discount structure (R. 311). This "graduated discount schedule" was based on cost curves developed by independent management engineers with extensive experience in the dairy industry (R. 244-45). The cost curves indicated that different net prices were warranted by "differences in costs resulting from combinations of volume purchased and delivery services rendered" (R. 271). Under the graduated discount schedule, price changes followed the curve, and consequently an increase or decrease of as little as a quart a day produced a change in the discount rate. Thus, to take examples from plaintiff's *prima facie* case, customers purchasing an average of 108.3, 111.7 and 118.3 points per day respectively, received discounts of 6.16%, 6.22% and 6.36% (R. 62-63).

The graduated discount system is thus basically different from the bracket system. Under the bracket system, a few classes are defined and everyone in the same bracket receives the same price. Under the graduated system, however, a different net price is charged to every individual purchaser—except in those rare instances where two customers purchase precisely the same number of points per day.

The record identifies three customers whose purchases exceeded the maximum on the graduated schedule. In March, 1955, the top discount on the schedule was 8% (R. 67-68). These three customers all received even higher discounts: Goldblatt's received 8¼%; Kroger, 11%; and A&P, 11% (R. 62-63).

Plaintiff's Prima Facie Case.

For its *prima facie* case against Bowman, the Government selected nine sample stores, five on delivery Route 129 and four on Route 1471 (R. 59-63). Route 129 included an A&P, a Kroger and three independents (R. 62). The largest independent was located within a mile of the two chain stores (R. 72). Route 1471 included an A&P, a Goldblatt and two independents, the larger of which was less than a mile from the A&P and a little more than a mile from Goldblatt's (R. 63, 73-74).

Schedules showed the volume of purchases by each of the sample stores during March, 1955, and the differences in discounts paid to them (R. 62-63). The prices at which these stores resold dairy products were not shown.

In addition, plaintiff's evidence showed a series of price changes in September, 1955, during which period Kroger and A&P paid Bowman different prices and Bowman used a bracket system for a short time (R. 60-61).[3]

With respect to the competitive injury element of plaintiff's *prima facie* case, Bowman introduced extensive evidence showing the character of the markets in which the sample stores operated. Chicago is composed of a number of so-called "community areas" separated by physical and ethnic boundaries, which delimit relatively isolated neighborhood markets (R. 236-42). The evidence showed that the sample independent stores were located in different community areas from the sample chain stores, and were separated by natural boundaries (R. 240-42, 262-63, 269-

3. The price changes in September, 1955, occurred promptly after Borden lost the Jewel Tea account to the Dean Milk Company, and also promptly after Dean reduced its prices and Dean and Hawthorn Mellody promulgated new bracket discount schedules which Bowman temporarily adopted (R. 121, 257-58).

70).[4] Each of these areas was highly congested and contained a large number of grocery stores.[5] A market survey showed that competition between the sample chain and independent stores was, at most, negligible (R. 269-70, 521, 262-63). There was no evidence that any sample store lost any business to any other sample store, or suffered any actual "injury".[6]

None of the sample chain stores was being served by Bowman when the record was closed (R. 540, 554).

Bowman's Cost Defense.

Bowman's cost defense included: (1) a justification on an individual store-by-store basis of each price differential identified in the plaintiff's *prima facie* case (R. 328-33, 343-44); (2) a justification of the discount to the entire Kroger chain, and also a separate justification of the discount to the entire A & P chain, based on an analysis of the cost of serving each unit in each chain (R. 333-36, 345-69); and (3) an explanation of the basic cost studies which were made

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4. Thus, the area known as "Brighton Park" was surrounded by these boundaries: "* * * on the west by the Atchison, Topeka and Santa Fe Railroad, on the north by the Illinois-Michigan Canal, on the east by the Pittsburgh, Chicago, Cleveland and St. Louis Railroad and by Western Avenue, and on the south by the Chicago River and the Indiana Railroad." (R. 241.)

5. Each of the areas covered roughly two square miles, had 200 or more retail grocery stores (with one exception in which there were 121 stores) and had populations varying between 30,149 and 94,134 (R. 240-42).

6. Bowman did not deny that the sales of dairy products to the sample stores were "in commerce" within the meaning of Section 2(a) of the Robinson-Patman Act. Bowman did point out that the Government had failed to prove that its bulk business (*i.e.*, sales to restaurants and hotels), which was operated by a separate division of the company, was in interstate commerce. Possibly for this reason, the Government abandoned its appeal insofar as it related to the bulk phase of the case (Jurisdictional Statement, page 2, footnote 1).

before the graduated discount schedules were introduced in 1953 (R. 245-50, 271-310).

1. The Government rested its affirmative case on the different discounts paid to nine stores on Routes 129 and 1471 during March, 1955. In its cost defense, Bowman analyzed the actual purchases made by each store on these two routes during the week of March 14, 1955. The actual delivery tickets were used to compute the number of units and the number of cases delivered to each customer, the proportion of units represented by glass containers and the proportion represented by fiber containers (R. 329-33). From this data the cost of delivery to each customer on both routes was determined. The cost of serving each independent was compared with the cost of serving the specific chain store units on the same routes. Referring to the specific discount differentials on which the plaintiff based its case, the study concluded:

> "The cost calculations show that the lower net prices (higher discounts) to the chain store outlets on Routes 129 and 1471, when compared individually to the other stores on those routes, do not exceed the effect of cost differences resulting from greater volume and fewer delivery services." (R. 329.)

2. As a separate study, Bowman also tested the entire Kroger discount and the entire A & P discount against the graduated discount schedule. The discount schedule was established on the basis of a curve which ensured that Bowman's gross margin on sales to a customer receiving a lower net price would be at least as high as the gross margin earned on sales to a customer paying a higher price (R. 279). In testing the amount of discount that could be paid to a chain store, it was determined that the gross margin on a chain store transaction should be at least as high as the gross margin on a transaction with an independent store at the same volume level (R. 333-34).

The actual volume of purchases by each unit in the

Kroger chain was computed for the week of March 14, 1955 (R. 335). From that data, and the minimum gross margin for each volume level, the discount that could have been justified for each unit in the chain was calculated on a store-by-store basis (R. 335). The sum of discount payments that could have been justified for each of the 49 Kroger stores in the Chicago area exceeded the amount they were in fact paid at the 11% rate (R. 335). If the 49 stores had been billed individually, 47 of them would have received a discount of 11% or more, and only two of them would have received less (R. 335).

The same procedure was followed for the A&P stores. If billed individually on their actual purchases, 42 of the 43 A&P stores in the Chicago area, which Bowman was serving in March, 1955, would have received a discount of 11% or more (R. 336). The discount actually paid to A&P was less than the sum of the discounts that could have been justified on a store-by-store basis (R. 336).

The cost studies also included a justification of the bracket system which was in effect in September, 1955 (R. 349-56), and exhibits showing that Bowman had returned to a graduated discount schedule in January, 1956 (R. 357-369). Even though the plaintiff had not included January, 1956 prices in its *prima facie* case, the Bowman exhibits contained the cost curves on which those discounts were based. The exhibits showed that Bowman's product costs, and also its delivery costs, had risen between March, 1955, and January, 1956, but that its prices had declined (R. 345, 364-65).

These exhibits indicated that the differentials between the cost of delivery to chains and independents was slightly larger than indicated by previous tests.[7] This in-

7. The statement on page 16 of the Government brief that there was a change of 25¢ per point in the cost of delivery to chain stores is, of course, erroneous. The reference should be to 25/100ths of a cent.

crease was a reflection of the fact that chain stores use a relatively small percentage of glass containers which require more handling than fiber containers. This so-called "glass *vs.* fiber issue" was the subject of repeated discussion in the trial court (R. 105, 107, 108, 252, 437, 1218, 481, 482). The Government vigorously challenged Bowman's position on this issue, but the Government's rebuttal exhibits confirmed the fact that only 18% of the containers sold to chains were glass as compared with almost 25% of those sold to independents (R. 481-82).

3. In addition to the justification of the discounts on Routes 129 and 1471 and the store-by-store analysis of the Kroger and A&P discounts, Bowman's cost defense included a description of the basic cost studies which were made before the first graduated discount schedule was introduced in 1953 (R. 245-50, 271-310, 328-69). The studies took into account a wide variety of elements affecting the cost of delivery. They repeatedly point out that differences in volume and differences in methods of delivery both materially affect delivery costs.[8]

In developing time standards, the management engineers drew upon their experience in studying 107 different dairies

8. "Delivery is a complex function, principally due to the wide variations in quantity delivered and services performed at each store" (R. 272).

"The combinations of varying cost rates, order quantities, and delivery services were considered in the careful preparation and analysis of cost data to formulate an equitable discount plan" (R. 274).

"The cost calculations show that the lower net prices (higher discounts) to the chain store outlets on Routes 129 and 1471, when compared individually to other stores on those routes do not exceed the effect of cost differences resulting from *greater volume and fewer delivery services*" (R. 329. Emphasis added).

"As long as the store receiving the lower net price returns an equal or greater gross margin than the store receiving the higher net price, the cost savings passed on to the former have not exceeded those accruing from greater volume and/or fewer regular delivery services to the chains" (R. 333-34).

involving 2,893 time studies on milk routes in different sections of the country (R. 245), conducted time and motion tests on 33 routes operated by Bowman out of its Elston division, re-studied 22 of those routes a second time, and compared the results of those 55 studies with additional time studies of routes in Bowman's Forest, Englewood and South divisions (R. 247, 252-53, 437, 476).

The studies showed that a relatively minor portion of the driver's time was spent at the plant, in transportation from the plant to the route and in travelling between customers on the route. About 80% of the time of the driver was "service time" spent at various customers' establishments (R. 476). The availability of the driver's time, rather than the capacity of his vehicle, limited the quantity of business which any route could handle, and provided the only common denominator for measuring the many factors that comprise a customer transaction (R. 623-35, 667-68, 1290-95).

Based on the time studies and their experience, the cost experts determined the standard time required to perform each of the various components of the delivery function (R. 286; see also R. 287-98). The way in which service time was spent varied widely among the hundreds of stores served by Bowman (R. 272). Variables to be taken into account included the number of cases, the number of containers, the mixture of glass, fiber and different sized containers, the over-all volume purchased, and the different service requirements of the various stores. The service time included 18 different cost elements, one of which was referred to as "customer services" (R. 286).

In the category of "customer services", the cost studies grouped a number of different activities which were performed with varying frequency depending on the needs or desires of the specific customers. Thus, some of the customer services might be needed only on certain days of the

week,[9] others at the specific request of the customer,[10] others only in certain stores presenting peculiar delivery problems,[11] and others as a routine matter for most stores.[12] Although only about two-thirds of Bowman's customers required such services on a daily basis, the studies concluded that they were a standard part of the delivery function, and that the expense of providing customer service should be included as an element in the cost studies (R. 272, 330).[13]

The calculation of the standard time required for customer services took into account the fact that these services were performed with varying frequency. This was done by dividing the aggregate amount of time required for these services by the total number of units delivered to all stores (R. 528).[14] A standard time per unit was derived which

9. For example, on high-volume days such as Saturdays (R. 556), some stores require: "Call back later in the day to deliver more merchandise if the refrigerated equipment cannot accommodate the entire order at once" (R. 275).

10. "Drive additional distance if store owner requires delivery at a specified time and disrupts regular route schedule" or "Cash checks for store owner, etc." (R. 275).

11. "Leave some merchandise at a refrigerated showcase and deliver remainder of the order to a storeroom" (R. 275).

12. "Rearrange merchandise in showcase so that the earliest dated containers are sold first" or "Check showcase as to quantity of merchandise remaining from previous delivery and advise store owner" or "Remove containers from Bowman's wooden cases and place on shelves in walk-in cooler or arrange in refrigerated showcase" or "Advise and assist owner in arranging dairy products' display" or "Receive daily cash payment for quantity delivered" (R. 275).

13. A Government expert witness acknowledged that such expenses should not be disregarded even though they were optional and not uniformly performed (R. 920).

14. In dividing the aggregate time required for these services by the total units delivered, the units delivered to chain stores were included. Since chain stores do not receive these services and were not charged for them, the units delivered to the chains could have been omitted which would have increased the standard time per unit, and thus increased the cost of these services to independent stores.

permitted the cost of these services to be averaged throughout the entire group of store customers.

Standard time allowances were similarly derived for each of the other elements of the cost of delivery to store customers (R. 286-98). These standard time allowances were then used in establishing the graduated discount schedules (R. 299-310). The validity of the Bowman discount schedules, and the studies on which they were based, have never been challenged insofar as they apply to independent stores (R. 900). No contention has been made by the Government that the graduated discounts were not fully justified by cost savings.

The same standard time allowances and cost studies were also applied to chain stores. However, the cost studies recognized that three Bowman customers (Goldblatt's, A&P and Kroger) did not require customer services or daily cash collections. In calculating the discounts which could be justified at any volume level on a "chain store transaction (or a transaction with any other group of stores receiving similar limited service)", the cost studies excluded the cost elements that did not apply to such transactions (R. 333).

Although the problem of justification which was posed by the Government's *prima facie* case involved a comparison of sample chain stores with sample independents, the Bowman cost studies repeatedly pointed out that chain stores were merely an example of a broader category. Any store, or group of stores, purchasing in comparable volume and requiring the same limited services, would be in the same cost category.[15] The record, however, does not identify any other such stores.

15. "At various volume levels, calculate the maximum available margin for an independent store (*or any other group receiving*

Plaintiff's Objections to the Bowman Cost Studies.

Prior to the entry of the pre-trial order containing Bowman's cost defense, the cost studies, together with the underlying data on which they were based, were submitted to the Government for review and analysis (R. 97). The parties then identified their areas of disagreement with respect to the studies (R. 250-52) and introduced detailed material pertaining to the areas of dispute (R. 252-57, 522-40, 623-35, 414-40, 469-518).

By identifying plaintiff's objections to the cost studies, the parties were able to avoid encumbering the record with the voluminous underlying data which might otherwise have been required to establish the admissibility of the exhibits placed in the record, or to prove the statements and calculations set forth in those exhibits. The parties also agreed that the ultimate conclusion of whether or not the cost defense should be sustained would depend on the resolution of the areas of disagreement which were identified by stipulation (R. 111, 114-16, 250-52). This agreement made it unnecessary for Bowman to develop any additional evidence, except to the extent necessary to rebut the plaintiff's specific objections.

At the pre-trial conference on March 7, 1957, after the plaintiff's objections had been identified, the following colloquy took place:

> "Mr. Stevens: Your Honor, if I may make this observation? As I understand it, those three objections, they are not to the admissibility of the cost.

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equally extensive delivery services) and a chain store (or any other group receiving equally limited delivery services)" (R. 284).

"With maximum available margin determined for chain stores *or other limited service groups* • • •" (R. 278).

"At any volume point along that line, the gross margin on the chain store transaction (*or transaction with any other group of stores receiving similar limited service*) is the same as the gross margin on an independent store transaction" (R. 333) (Emphasis added throughout this footnote).

The Court: They go more to the weight.

Mr. Stevens: They go to the ultimate conclusion of whether or not this is a sound cost analysis and I think if we prevail in this case—

The Court: As to admissibility.

Mr. Stevens: Of course. As I understand the Government's position if we prevail on the issues which separate us now they would accept the fact that our defense should be sustained. I think it went that far and I think we made the contrary agreement if we failed on those issues that this defense would not be sustained.

Mr. Long: I think that is right and fairly well stated.

The Court: Let it be so understood and you argue on those three points in the briefs. If you prevail then this pretty well sustains your defense.

Mr. Stevens: That was my understanding.

The Court: Very good. Is that yours?

Mr. Long: Yes.

The Court: It is so understood then" (R. 111; see also R. 114-16).

Paragraph 28 of the pre-trial order, which was thereafter entered, stated that the plaintiff made three objections to Bowman's cost studies: (1) that only Elston division routes were used for the time studies; (2) that certain division expenses should not have been apportioned on the basis of drivers' time; and (3) that the cost studies omitted an analysis of central office overhead (R. 250-51). Except for these three objections, and one additional point based on the "glass vs. fiber" issue, it was expressly agreed that:

> "* * * Plaintiff has no objection to the validity of the cost studies submitted by the defendant Bowman to justify the differences in prices and discounts to Bowman store customers identified in the plaintiff's affirmative case" (R. 252).

Immediately prior to the entry of the pre-trial order, Government counsel expressed concern about the language

of paragraphs 28, 29 and 31, stating that he felt that the order should merely identify the Government's three "principal" objections to the studies (R. 227-28). Bowman objected to this suggested change on the ground that it might then have to come forward with additional evidence (R. 229; see also R. 231). It was then explained that the Government desired to support these objections with detailed exhibits as a part of its rebuttal, and wanted "to reserve the right to raise the *legal question* as to whether or not Bowman's cost studies are within the scope of the meaning of the section of the Clayton Act" (R. 229-32. Emphasis supplied).

The Court described the Government's reservation as "purely argumentative" (R. 230), stated that he wanted to "hold the record as low as I can" (R. 230) and added that "we had agreed on [paragraph 28] heretofore * * *" (R. 231). At the conclusion of the colloquy, the order was entered without inserting the word "principal" which the Government had requested.

Thereafter the parties submitted voluminous additional data on the specific objections to the cost defense reserved by the Government in paragraphs 28, 29 and 31 of the pre-trial order (R. 252-57, 522-40, 623-35, 414-40, 469-513). The reserved "legal question" was identified in the Government's post-trial reply brief. The question there argued was whether or not customer services are a "method of sale or delivery" within the meaning of the cost proviso. This question is not raised on this appeal.

One of the rebuttal exhibits offered in connection with the "glass vs. fiber" issue indicated that the average chain store purchased over 500 points per day while the average independent purchased 56 points per day (R. 481-82).[16] This same exhibit indicates that Bowman served

16. The A&P stores which Bowman was serving in 1955 were approximately the same size as the Kroger stores (R. 335-36).

four independent customers purchasing over 400 points per day. The Government relies heavily on these large independents in its argument in this appeal (Br. 32-35). But the record does not show whether these stores are in the "Chicago area", as defined in the complaint (R. 481). Nor does the record indicate what discounts were paid to these stores.

The Government's rebuttal data, offered in connection with the objection concerning apportionment of certain expenses on the basis of drivers' time, included an exhibit which refers to the frequency of the receipt of customer services by independent stores at various volume levels (R. 480). This exhibit shows that customer services were provided to large independents on a daily basis, but were provided less frequently to small independents. The Government contended, and offered further exhibits to show, that Bowman had not correctly calculated the charge for customer service time (R. 437, 463-65, 477-79). Thereafter, in its sur-rebuttal, Bowman pointed out that the Government had failed to take into account the varying frequency of the performance of customer services, particularly for the small independents, and that with the irregular frequency taken into consideration, a proper charge for this cost element had been calculated (R. 524-28).

The Government asserts that Bowman has conceded that some independents did not take customer services (Br. 13, 31). This is not correct. It is true that some independents do not take customer services *every day*. However, neither Bowman nor the Government ever identified a single independent store which did not take these services at all (R. 526). The performance of customer services for the sample independents identified in the plaintiff's *prima facie* case has never been disputed.

SUMMARY OF ARGUMENT.

In the introduction to its argument, the Government identifies the one so-called "undisputed fact" on which its entire appeal is predicated. This "undisputed fact" is the assumption that Bowman sells to certain independents who are exactly like chain store units "in every way relevant to costs" (Br. 21-22). Far from being an "undisputed fact", the assumption is completely without basis in fact. The record shows differences in both quantity and method of delivery which are significant. The *largest* independent store identified in the record is about half the size of the *average* chain store. Moreover, the evidence affirmatively shows that the method of delivery to *all large independents* is different from, and more costly than, the method of delivery to chains. In short, the Government's entire argument against Bowman is based on a false assumption.

I. Plaintiff's *prima facie* case of price discrimination rested on evidence of price differentials among nine selected sample stores. Bowman met the *prima facie* case "thus made" by proving that the price differentials among all of the sample stores were fully justified by cost savings on a store-by-store basis. Under the statute, this was a sufficient defense to the plaintiff's case.

II. The Government claims that the question of law raised by the record is whether Bowman can cost justify greater discounts to chain stores than to independent stores where the stores operate identically in every cost saving respect. To support this question, the Government suggests that a handful of large unidentified independents referred to in its rebuttal data may have used the same method of delivery as chain stores. However, the rec-

ord affirmatively shows that all large independents received a different and more costly method of delivery than chain stores. Moreover, the Government never proved any of the requirements for a *prima facie* case of discrimination against any of these unidentified stores.

III. The Government's objections to the Bowman cost studies were limited by pretrial order. The question now argued by the Government was not preserved in that order.

IV. The different prices charged by Bowman to its customers reflected cost savings resulting from differences in quantities purchased and also from differences in methods of delivery. Both cost factors were real and significant, and fully justified the classification of Bowman's customers. There is no evidence that any Bowman customer was improperly classified in terms of these cost factors.

V. Under the cost proviso to Section 2(a) of the Robinson-Patman Act, a seller may classify customers on the basis of *actual* cost differences. The proviso does not require the seller to prove that these actual cost differences were "necessary" as to every individual purchaser in each class.

VI. An appraisal of the entire case shows that the entry of the injunctive relief requested by the Government is unwarranted.

ARGUMENT.

I. BOWMAN COST JUSTIFIED ALL OF THE PRICE DIFFERENTIALS IN THE GOVERNMENT'S PRIMA FACIE CASE.

Under Section 2(b) of the Robinson-Patman Act, a seller charged with price discrimination has the burden of rebutting "the *prima facie* case thus made" by the plaintiff. In *Automatic Canteen Co.* v. *F. T. C.*, this Court concluded that this statutory language makes "it clear that ordinary rules of evidence [are] to apply."[17] 346 U. S. 61, 78 (1953). The statutory burden of rebutting the case "thus made" is consistent with the ordinary rule of evidence that a defendant's rebuttal need be no broader than the scope of the *prima facie* case established by the plaintiff.

Plaintiff's *prima facie* case was confined to nine carefully selected grocery stores. The selected stores included exceptionally large independent stores and exceptionally small chain store units.[18] Presumably the plaintiff selected examples of price differentials which it believed would fairly test the validity of Bowman's discounts. For no

17. The Court noted the following comment of Congressman Patman in describing the Section 2(b) rule as to the burden of proof: "'It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference. It is the law of this land exactly as it is written there.' 80 Cong. Rec. 8231." 346 U. S. at 78, n. 20.

18. The average independent store purchases 56 points per day, and over 98% of the independents purchase less than 200 points per day (R. 481, 529). The selected independent stores relied upon by the Government in its *prima facie* case purchased over 200 points per day (R. 61-63, 72-74). In contrast, the average chain purchased over 500 points per day, but none of the selected chain stores purchased over 360 points per day (R. 482, 62-63).

evidence was offered to establish a *prima facie* case as to any other stores served by Bowman.

Without resorting to any classification of store customers, Bowman tested the cost of serving each selected independent store against the cost of serving each selected chain store outlet (R. 328-48). These tests showed that the price differentials to these stores when compared on an individual store-by-store basis were fully justified by cost savings (R. 329).

In addition, Bowman tested the cost of serving each store in the Kroger chain (and also in the A & P chain) against the cost of serving independent stores purchasing at all volume levels (R. 333-36). These additional tests disclosed that the discounts granted to the entire Kroger chain and to the entire A & P chain did not exceed the sum of the discounts that would have been allowable to the individual chain store units (R. 335-36).

Bowman's cost defense unquestionably rebutted the "*prima facie* case thus made" by the Government. For if the nine stores selected by the Government were sufficiently representative to make out a *prima facie* case under the statute, then Bowman's justification of prices to those stores was equally sufficient to rebut that case.[19] Significantly, the Government's brief comments at length concerning nine admittedly *hypothetical* stores (Br. 27-30), but makes no reference at all to the facts concerning the nine *actual* stores which constituted the subject matter of its *prima facie* case.

19. See *F. T. C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 553 (1960); *F. T. C.* v. *Standard Brands, Inc.*, 189 F. 2d 510, 515 (2d Cir. 1951); *Samuel H. Moss, Inc.* v. *F. T. C.*, 148 F. 2d 378, 379, 380 (2d Cir.), *cert. denied*, 326 U. S. 734 (1945).

II. THE QUESTION OF LAW RAISED BY THE GOVERNMENT ASSUMES A PRIMA FACIE CASE NEVER PRESENTED.

The question of law which the Government now seeks to raise "is whether the * * * greater discount to a chain store operating identically to an independent can be 'cost-justified' by treating the chain store and the independent as members of different classes of customers although they are individually alike in every way relevant to costs" (Br. 22). It is thus assumed that one or more independent stores operated identically to the chain stores in relevant cost saving respects and that the Government made out a *prima facie* case as to these stores. There is no record support for this assumption.

At the trial, the Government's rebuttal exhibits on the "glass *vs.* fiber" issue indicated that chain stores served by Bowman purchased an average of over 500 points per day in contrast to the average independent purchase of 56 points per day (R. 481-82). One of these exhibits indicated, however, that Bowman served four independents which purchased over 400 points per day (R. 481). Apparently it is these large independent stores that the Government assumes operated "identically" to the chain stores served by Bowman.

No proof was offered to show that these independent stores in fact operate identically to chain stores in cost saving respects. The record affirmatively shows that all independents of that size received daily customer services, which chain stores did not receive (R. 480, 526, 1197). Indeed, the uncontradicted evidence shows that every independent purchasing 180 points or more per day received customer services (R. 480).

Moreover, the Government never proved a *prima facie* case as to any of the large independents referred to in

its rebuttal exhibits.[20] None of these stores was identified in the record. The record does not even disclose whether any of them were located in the "Chicago area", as defined in the complaint (R. 4).[20] There is no evidence to show whether the net prices paid by these stores were higher, lower or the same as the net prices paid by chain stores served by Bowman. Nor does it appear whether any of these stores were competing with, or even located near, a chain store unit served by Bowman.

The burden imposed by the Government's *prima facie* case cannot be enlarged by rebuttal data which does not satisfy any of the requirements for a *prima facie* case. Nor can it be contended that a *prima facie* case as to nine selected stores imposed a burden upon Bowman to justify hypothetical cases of price discrimination that might or might not exist, and might or might not have competitive significance (Br. 38). As this Court has pointed out, "price differences constitute but one element of a § 2(a) violation." *F. T. C.* v. *Anheuser Busch, Inc.*, 363 U. S. 536, 553 (1960).

The Federal Trade Commission provided a complete answer to the Government's theoretical argument in *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948), *rev'd in part on other grounds*, 191 F. 2d 786 (7th Cir. 1951), *cert. denied*, 344 U. S. 206 (1952). The Commission there stated:

> "It has been urged that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket. *This*

20. The rebuttal exhibits referring to these stores were taken from data compiled from all of Bowman's store divisions (R. 181), which serve the various outlying areas as well as the Chicago Area itself (see e.g. R. 335-6).

argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. But there has been no such showing in this case. Any annual quantity system of pricing is vulnerable to this argument and it may be controlling where it has practical aspects. *Where it is purely theoretical, however, it does not constitute a satisfactory basis for disallowing the whole effort at cost justification.*" (44 F. T. C. at 394. Emphasis added.)

III. THE QUESTION OF LAW NOW RAISED BY THE GOVERNMENT WAS NOT PRESERVED IN THE TRIAL COURT.

In the trial court, the Government stipulated that the validity of Bowman's cost defense should turn on the evidence submitted on specific objections made by the Government against the cost studies (Statement at 12-14). This stipulation, incorporated in a pre-trial order, was made after the Bowman cost studies and the underlying bulk data supporting the conclusions therein had been subject to intensive review and analysis by the Government for a period of several months (R. 97, 250-52). Because of this stipulation, most of the underlying data supporting the basic cost studies was not placed in evidence, and the additional evidence developed by Bowman was limited to these issues (R. 328-69).[21]

The trial court, and the parties, thus followed the procedure recommended by the Judicial Conference as set forth in the Handbook For Procedure in Antitrust and Other Protracted Cases (1951).

"Whatever may be the objections and difficulties to

21. This restriction on the submission of underlying bulk data to evidence relating to disputed matters is consistent with the recommended procedure for protracted cases set forth in the Handbook for Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62, 78 (1951).

> the specification of issues in ordinary actions, the necessity for such specification in the cases with which this report is concerned is so great as to require that it be done no matter what the objection or difficulty. Unless it is done, the hearing cannot be confined to its proper limits, counsel are at a loss as to their position, and the judge is unable to relate the evidence to issues which are in dispute or to limit it to that which is relevant."
>
> * * * * *
>
> "Pleadings will not serve to particularize issues sufficiently in these cases, and motions for particulars will not serve that purpose. Such particularization must be achieved by informal conferences between judge and counsel well in advance of a possible trial date." 13 F. R. D. at 66-67.

The issues having been framed by pre-trial order, it is clear that the terms of that order controlled subsequent proceedings in the litigation. Thus, the Handbook states:

> "The issues as determined and framed in informal conference should be incorporated in an order of the court which should control the proceedings thereafter, as Rule 16 provides." *Id.* at 68.

And, Rule 16 of the Federal Rules of Civil Procedure provides in part that:

> "The court shall make an order which recites the action taken at the conference * * * and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. * * *"

The pre-trial order limiting the issues was never modified. The arguments now urged by the Government are

admittedly predicated on objections other than those preserved by the pretrial order.[22]

The federal courts have held that a pre-trial order framing the issues may not be disregarded on appeal.[23] Unless pre-trial orders limiting the issues in protracted litigation are honored in subsequent phases of the litigation, the salutary purposes of Rule 16, as implemented by the recommended procedures in the Handbook, will be substantially frustrated.

IV. BOWMAN CLASSIFIED ITS CUSTOMERS SOLELY ON THE BASIS OF COST FACTORS WHICH WERE SUBSTANTIAL AND REAL.

The Government repeatedly asserts that Bowman arbitrarily classified its customers as chains or independents rather than on the basis of substantial cost factors involved in dealing with store customers. Because of this asserted classification, the Government argues that no independent store could ever qualify for the higher discounts granted to Kroger and A&P.

The record demonstrates and the District Court found, however, that Bowman established separate classes of purchasers solely on the basis of substantial and real cost

22. The Government contends that it reserved the right to argue the basic invalidity of the cost defense by the general reservation applicable to all pre-trial orders that "the introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff * * * that the evidence sought to be introduced is immaterial or irrelevant" (Br. 41-42). This general reservation only reserved the right of the Government to argue weight, materiality and relevancy of evidence offered on these specific objections. It certainly did not reserve the objections to the cost studies which are now raised by the Government.

23. *Fowler* v. *Crown Zellerbach Corp.*, 163 F. 2d 733 (9th Cir. 1947); *Washington* v. *General Motors Acceptance Corp.*, 23 Fed. Rules Serv. 16.32, Case 2 (S. D. Fla. 1956); *cf. Meadow Gold Products Co.* v. *Wright*, 278 F .2d 867 (D. C. Cir. 1960).

saving factors (R. 570). Although the only stores identified in the record which qualified for the higher discounts were chain purchasers, there is no evidence to support the contention that independent stores could not have qualified for these higher discounts.

Bowman's cost studies repeatedly explain that cost savings result from a combination of "greater volume and fewer delivery services" (R. 333-34, 272, 274, 329).[24] In the case of Kroger and A&P, both cost saving factors were present and significant, and justified placing these purchasers in a higher discount group (R. 276-79).

The difference in purchase volume between these chain purchasers and the independent stores was *in itself* sufficient to justify placing nearly all of the independents in a lower discount group. The chain stores purchased an average of over 500 points per store on a daily basis (R. 482).[25] In contrast, the average independent purchased only 56 points per day (R. 481).[26] Because of the substantial cost savings resulting from large quantity pur-

24. The Government acknowledges that a "combination" of factors can be used to support separate classes (Br. 31).

25. The letter to A&P granting its discount in 1954 discloses that the discount was based on a comparison of the purchases of its stores and their required delivery services with those applicable to other stores (R. 69). Since the discount was clearly based on anticipated sales and agreed delivery services and since the cost studies confirmed that the chain discounts were in fact fully cost justified on the basis of subsequent purchases, the fact that the letter did not in terms require specific volume purchases is irrelevant under the cost proviso.

26. The Government states that the "Question Presented" is whether a seller "can cost-justify * * * discrimination simply by showing that the average cost of sales and delivery to all chain stores is lower than the average cost of sales and delivery to all independent stores" (Br. 3). Bowman did not base its prices, or justify its differentials, on the basis of any such averaging of the costs of serving independents. If it had, a *differential* of 12%, or 1% greater than the total chain *discount*, could have been sustained solely on the basis of volume (R. 346).

chases of these chain stores, Bowman could have justified its lower discounts to at least 96% of the independent stores *solely* on the basis of the volume of each independent store, without giving any consideration to the costs incurred in providing customer services and making daily cash collections.[27]

These additional cost factors were significant, however, in determining the discount group in which the large independents should be placed. It is undisputed that all large independents in fact took customer service (R. 526, 480), and that chain stores did not take such services (R. 1197). The combination of differences in volume and method of delivery justified all of the price differentials between the groups.[28]

Even though such services were not performed for all small independent stores on a daily basis, Bowman's cost experts concluded that they were required by independent stores, and thus represented a cost factor which should be taken into account along with volume in establishing the basic discount schedule (R. 272-75, 330). The soundness of this conclusion cannot be doubted; and indeed, the Government has not questioned the legality of the schedule insofar as it applies among the independent stores at

27. See R. 347 which shows the actual differential between independent stores at various volume levels and the average chain store of over 500 points and R. 346 which shows the available margin for chain stores at all volume levels. The difference between the available margin for the average chain and the margin for chain stores at lower volume levels represents the discount differential which could have been allowed between the chain purchasers and independent stores at each volume level solely on the basis of volume. See also R. 481 which can be used to compute the percent of independent stores operating at each volume level.

28. Bowman's cost studies revealed that the chain discounts were fully justified on a store by store basis when compared with the costs of serving independents at various volume levels (Statement, 5-8).

different volume levels (R. 900).[29] Nor does the Government question that these cost factors justify the creation of separate classes of customers.

The Government argues, instead, that Bowman's classification was not made in terms of these cost factors but rather in terms of store ownership. This is not true. The record clearly shows that Bowman's cost experts established and defined customer groups in terms which would permit any store to qualify for the higher discounts.

Bowman's cost experts expressly stated in their basic manual that the chain store category should include "any other group receiving equally limited delivery services" (R. 284; see also R. 278, 333). The higher discount group was frequently referred to in the studies as the chain store category for the reason that the only examples of that group which were identified were chain stores. If there were any independent super markets in the Chicago area whose purchase volume and method of delivery were comparable to Kroger's,[30] then presumably these stores would also receive the higher discounts. Whether there are in fact any such stores in the Chicago area is not revealed by the record, and there is no claim that any sample store identified in the *prima facie* case was improperly classified.

Since Bowman's customer classes were in terms based solely on real and significant cost saving factors, and since the record does not identify a single store customer that was improperly classified, the Government's argument that Bowman arbitrarily placed its independent customers in a lower discount group on the basis of store ownership is without merit.

29. In fact, a Government expert acknowledged that such expenses should not be disregarded even though they were optional and not uniformly performed (R. 929).

30. The record reveals that Bowman lost both the A&P and Goldblatt accounts several years ago (R. 540).

V. THE COST PROVISO TO SECTION 2(a) DOES NOT REQUIRE THAT CLASSIFICATION OF PURCHASERS BE BASED SOLELY ON "NECESSARY" DIFFERENCES IN DELIVERY COSTS.

In portions of its brief the Government acknowledges that Bowman's lower prices to the three chain purchasers were in fact based on actual cost saving factors (Br. 31, 36). It makes the ingenious contention, however, that these cost saving factors do not justify placing different purchasers in different discount classes unless the higher costs of serving the lower discount class were shown to be "necessary"[31]

The Government would thus re-write the cost proviso to read as follows:

> "Provided, That nothing herein contained shall prevent differentials which make only due allowance for *necessary* differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." (Italicized language added.)

There are many sound reasons why this Court should not be asked, in effect, to re-write what Congress has written. Although it may not be proper to refer to the "plain meaning" of any part of the Robinson-Patman Act, the cost proviso in terms contemplates actual cost differences without any qualification, and the legislative history is consistent with this view.[32] Moreover, this Court has already stated that a discount differential "can be justified by a seller who proves that the full amount of the discount

31. The Government does not appear to rely upon this argument in its case against The Borden Company (Compare the Government's brief herein, p. 31 with its brief against Borden, p. 36).

32. See H. Rep. No. 2287, 74th Cong., 2d Sess. at 9-10; S. Rep. No. 1502, 74th Cong., 2d Sess. at 5.

is based on his actual savings in cost." *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 48 (1948).

By what standard does the Government ask the courts to determine whether or not a method of delivery is a "necessary" difference between customers? The fact that one method may be employed for a few customers, and a different method for hundreds of others, would seem to indicate that the seller has done what is "necessary" to secure the patronage of the different types of customers with whom he deals. Since the wants of the buyers determine what services must be supplied, the mere fact that costs are actually incurred on a widespread basis establishes their "necessity".

Even though a combination of fewer delivery services and greater volume justified placing chains in a higher discount group, the Government asserts that neither cost factor *in itself* was a "necessary" difference between independents and chains. It is argued that Bowman could only show that the higher prices charged to the independents were necessary by affirmatively justifying the chain discounts against every single independent store.

Such a requirement would rob classification of its value, particularly in cases in which price differentials are based on a combination of cost factors. It is indeed the antithesis of the Congressionally-approved concept of classification,[33] and is directly inconsistent with prior court and Federal Trade Commission decisions,[34] and with the recom-

33. The legislative history of the Robinson-Patman Act affirmatively indicates that Congress intended to permit price differences based on cost savings between different classes of customers. See H. R. Rep. No. 2287, 74th Cong., 2d Sess. at 10; Hearings on H. R. 8442, H. R. 4995 and H. R. 5062 Before the Committee on the Judiciary of the House of Representatives, 74th Cong., 1st Sess. at 106.

34. See *Reid* v. *Harper and Brothers*, 235 F. 2d 420, 422 (2d Cir. 1956); *American Can Co.* v. *Russellville Canning Co.*, 191 F.

mendations of the Federal Trade Commission's Advisory Committee on Cost Justification under the Robinson-Patman Act. The Committee's *Cost Justification Report* (1956) states:

> "Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale or delivery in dealing with certain customers." (at 11.)[35]

The dangers inherent in an unduly restrictive interpretation of the cost proviso have frequently been identified.[36] These dangers should persuade the Court that a seller's right to pass cost savings on to his customers in the form of lower prices should not be confined any more narrowly than is required by a literal reading of the cost proviso. Interpolation of the word "necessary" would effectively destroy the usefulness of classification and

2d 38, 59 (8th Cir. 1951); *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948), *rev'd in part on other grounds*, 191 F. 2d 786 (7th Cir. 1951) *cert. denied*, 344 U. S. 206 (1952).

35. The Government's three cost experts employed in the trial court were members of this Advisory Committee and signed the Report. Each of these experts reaffirmed his agreement with this quoted statement in this proceeding (R. 671, 832, 943-44).

36. *Automatic Canteen* v. *F. T. C.*, 346 U. S. 61, 68 (1953); Report of The Attorney General's National Committee to Study The Anti-Trust Laws, 71-74 (1955); Handler, Recent Anti-Trust Developments, 71 Yale L. J. 77, 103-04 (1961); Rowe, Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman, 60 Yale L. J. 929, 962-64.

would therefore be inconsistent with the broad construction indicated by the words "due allowance."

The Government further argues that even a showing of actual cost differences for every single price differential is not sufficient to prove that cost differences are "necessary". It is said that the seller must also prove the cost saving factors were equally available to all buyers (Br. 35). Interpolation of the word "necessary" is thus a device for incorporating into the cost proviso of Section 2(a) the "proportionally equal" requirements of Sections 2(d) and (e). This Court has held, however, that the requirements of these Sections are not to be commingled. *F. T. C.* v. *Simplicity Pattern Co.*, 360 U. S. 55 (1959). The competitive injury requirement of Section 2(a) is not included in Section 2(d) or (e), and cost justification provides no defense for violation of these sections. *Id.* at 70-71. Thus, if Bowman, or any other seller, were charged with a violation of the proportionally equal requirement of Section 2(d) or (e), cost justification would be entirely irrelevant to the charge. No such complaint has been made against Bowman, and no evidence has been offered by either party on the issue of availability of lower prices to large volume independents who might decide not to take the more extensive delivery services.[37]

Without evidence either way on this question, it is manifestly unfair for the Government to assume that no independent could ever qualify for the same discount as a chain. Bowman's customer groups are expressly defined

37. Necessarily the question of availability of lower prices would arise only where the rejection of the more extensive delivery services would require a lower price in order to justify a differential with respect to a competing higher discount store. For it is clear from the statute and its legislative history that cost savings are not required to be passed on to purchasers. See Hearings on H. R. 8442, H. R. 4995 and H. R. 5062 Before the Committee on the Judiciary of the House of Representatives, 74th Cong., 1st Sess. at 106.

to permit this possibility. Moreover, every customer who was shown by the record to take only limited services received a discount properly reflecting the lower cost of delivery. These customers included not merely Kroger and A&P, each of which received an 11% discount, but also Goldblatt's which received 8½% (R. 62-63). There is no reason to make the arbitrary assumption that Bowman would refuse to recognize cost saving factors which would justify a special price for a giant supermarket operated by an independent.[38] Nor can it be assumed, without support in the record, that Bowman foisted services on customers who did not want them, or that Bowman charged customers for services they did not receive.

Whether such evidence was omitted because it is unavailable, or because the theory of the Government's case changed after the appeal was taken, is of no importance. In either event, the record does not support the Government's position and no violation of Section 2(d) or (e) of the Robinson-Patman Act was alleged. Had such a violation been alleged, the Government would have had the burden of proving its charge. Without making any such charge, the Government in effect is arguing that Bowman had the burden of disproving it. Since the entire cost defense would have been irrelevant in connection with issues raised by a charge under Section 2(d) or (e), arguments relevant to such unalleged charge are not appropriately made in connection with Bowman's cost defense.[39]

38. Such a price, like the Goldblatt, Kroger and A&P prices, would have to be paid on the basis of the graduated discount schedule in the sense that it should be no lower than would be justified by comparison with that schedule.

39. See Haslett, Price Discriminations and Their Justifications Under The Robinson-Patman Act of 1936, 46 Mich. L. Rev. 450, 473 (1948).

VI. NO NEED FOR EQUITABLE RELIEF HAS BEEN SHOWN.

The Government has failed to prove that Bowman granted a discount to any store which was not cost justified. As is pointed out in earlier sections of this brief, the Government does not dispute the fact that Bowman justified the discount differentials between each of the selected stores in the *prima facie* case. Nor does the Government contend that the graduated discount schedule is not based on demonstrated cost savings, insofar as it applies to all independent stores. Instead, the Government rests its case on an unwarranted claim that Bowman based its discounts on store ownership, and on hypothetical instances of possible discrimination which *might* not be fully justified by cost savings.

Even assuming that there might be a few examples of discount differentials that are not fully cost justified among the 3,270 customers allegedly served by Bowman in the Chicago area, this possibility is not a sufficient ground for equitable relief. There is no reason to believe that the unjustified portion of these possible differentials could reasonably be expected to cause any injury to competition.[40]

40. The Cost Justification Report of the Federal Trade Commission Advisary Committee specifically recommended that the words "due allowance" in the cost proviso be flexibly interpreted as requiring only a "reasonable allowance for cost differences based on sound accounting and pricing principles" and "should not be construed in every case to require full and complete cost justification of a price differential" (at 6).

Similarly, the Report of the Attorney General's National Committee to Study the Antitrust Laws recommended:

> "We advise a liberal interpretation of the statute's 'due allowance' criterion as enacting a reasonable de minimis concept to exonerate a challenged price even if an attempted cost defense falls short of 'justifying' it by a fractional amount. Similarly, *realistic adaptation of this concept should validate only partially 'justified' price concessions whenever the 'unjustified' portion of the differential alone could not reasonably cause 'injury' sufficient to bring the Act into play.*" (at 174-75. Emphasis added.)

No such showing has been made. Indeed, in Bowman's view the Government did not make out a *prima facie* case because the competition between the sample stores was, at most, negligible (Statement, 4-5). Certainly there has been no showing of any adverse effect on competition among Bowman's customers. Moreover, the fact that Bowman has lost the business of the A&P and Goldblatt chains suggests that Bowman's discounts were not high enough to keep it competitive on the primary level.

Great weight should be given to the Chancellor's conclusion that equitable relief is not warranted on the basis of the evidence presented. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). The trial court found that Bowman's discounts were adequately justified and were based solely upon a good faith effort to reflect cost differences in dealing with its customers (R. 570)[41]. After some 11 years of litigation, the Government offers no more than a mere possibility that a few unidentified differentials may not have been fully justified among all of the discounts granted to Bowman's customers. This possibility is not sufficient to justify equitable relief.

The decree suggested by the Government, in itself, shows the absence of any need for relief. The Government suggests that effective relief would consist of a simple decree enjoining Bowman from giving effect to any discount policy "based upon a classification of its customers into chain stores or independent stores" (Br. 44). It would seem that a classification which gave appropriate recognition to vol-

41. Price differences which are based on such good faith efforts to reflect cost differences should be given great weight, as the courts, Federal Trade Commission and commentators have uniformly recognized. See, *e.g.*, *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 59 (8th Cir. 1951); *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 394 (1948), *rev'd in part on other grounds*, 191 F. 2d 786 (7th Cir. 1951), *cert. denied*, 344 U. S. 206 (1952); Cost Justification Report, at 11, 22 (1956); Report of the Attorney General's National Committee to Study the Antitrust Laws, at 174-75 (1955).

ume differences, and which permitted stores receiving equally limited delivery services to be placed in the same category as chains, would comply completely with the proposed decree. The Bowman cost studies already establish precisely this type of classification (R. 278, 284, 333). Since there is no evidence and no reason to assume that Bowman has not followed its own cost studies, there is certainly no basis for granting the injunctive relief requested by the Government.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that this litigation should at long last be terminated by an affirmance of the judgment of the District Court.

Respectfully submitted,

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